3710

SUPREME COURT OF THE UNITED STATES.

No. 79.

JOHN GOURD AND AL., COMPOSING THE FIRM OF GOURD, FRERES, & COMPANY, PL'FFS IN ER.,

vs.

MORTIMER LIVINGSTON.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF NEW YORK.

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UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Mortimer Livingston, a citizen of the State of New York, plaintiff, and John Gourd and others, composing the firm of Gourd, Freres & Company, subjects of the Emperor of France, dependant, a manifest error hath happened, to the great damage of the said Gourd, Freres & Company, as is said, and as appears by their complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this last Monday of October, in the year of our Lord one thousand eight hundred and fifty-six, and of the independence of the United States the eighty-first.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The answer of the honorable the judges of the circuit court of the United States for the southern district of New York, containing the judgment record, bill of exceptions, and proceedings in the U. S. circuit court in the within-mentioned cause.

KENNETH G. WHITE, *Clerk.*

By the honorable Nathan K. Hall, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To Mortimer Livingston, a citizen of the State of New York:

Whereas, Gourd, Freres & Company lately issued out of the

Supreme Court of the United States a writ of error, directed to the judge of the circuit court of the United States for the southern district of New York, second circuit, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, between Mortimer Livingston, plaintiff, and Gourd, Freres & Co. are defendants, a manifest error hath happened, to the great damage of the said Gourd, Freres & Company:

And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, to be held at the city of Washington, on the first Monday of December next; you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the first Monday of October, in the year of our Lord one thousand eight hundred and fifty-six, and of the independence of the United States the eighty-first.

N. K. HALL.

Due service of a copy of the within citation is hereby admitted.

ALEX. HAMILTON, JR.,
Attorney for Plffs.

U. S. CIRCUIT COURT,
Southern District of New York.

Pleas before the judges of the circuit court of the United States for the southern district of New York, in the second circuit, at the City Hall, in the city of New York, in the said southern district of New York, of the term of October, in the year of our Lord one thousand eight hundred and fifty-five.

Witness, Hon. Samuel Nelson, justice.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that in the September term of this court for the year 1855, before the judges of the circuit court of the United States, in the southern district of New York, at the City Hall, in the city of New York, came Mortimer Livingston, by Alexander Hamilton, jr., his attorney, and brought into the said court, before the aforesaid judges thereof, then and there his certain declaration against John Gourd and others, whose names are unknown to the plaintiff, composing the firm of Gourd, Freres & Company, subjects of the Emperor of France, being in custody, &c., upon a plea of trespass on the case; which said declaration follows in these words, that is to say:

Gourd, Freres & Company, subjects of the Emperor of France, of a plea of trespass on the case.

For that whereas heretofore, to wit, at the several times hereinafter mentioned, "The New York and Havre Steam Navigation Company," a corporation duly created by an act of the Legislature of the State of New York, passed on the fourth day of April, in the year one thousand eight hundred and forty-nine, entitled an act to incorporate "The New York and Havre Steam Navigation Company," was owner and proprietor of a certain ship or vessel, called "The Humboldt," her tackle, apparel, steam-engines, machinery and appurtenances, the same then and there being of great value, to wit, of the value of four hundred and twenty-five thousand dollars, that is to say, at New York aforesaid, in the district aforesaid.

And whereas the said ship or vessel heretofore, to wit, on the twenty-second day of November, in the year of our Lord one thousand eight hundred and fifty-three, at Havre, in the empire of France, to wit, at the district aforesaid, was put up and employed by the said corporation as a general ship for the transportation of freight and passengers thence, that is to say, from Havre aforesaid by way of Cowes, in the kingdom of Great Britain, to the port of New York, in the southern district aforesaid.

And whereas the said ship or vessel so being put up and employed as aforesaid, the said corporation, on the day and year last aforesaid, at Havre aforesaid, to wit, in the said southern district of New York, received on board of said ship or vessel, to be carried and conveyed in said ship or vessel thence to the port of New York aforesaid, divers persons or passengers, and also divers large quantities of goods, wares and merchandise from the respective shippers of the respective portions thereof, to be carried and conveyed in said ship or vessel on freight, thence to the said port of New York, and to be there, to wit, at the said port of New York, delivered to the respective consignees thereof, which said goods, wares and merchandise were of large value, to wit, of the value of one million fifty-six thousand three hundred and sixty-six 44-100 dollars.

And whereas certain of the said goods, wares, and merchandise of large value, to wit, of the value of $22,950 35-100 so received on board of said ship or vessel as aforesaid, were consigned to the said defendants, or were otherwise lawfully deliverable to the said defendants as persons lawfully entitled to receive the same at the said port of New York on the termination of such intended voyage or adventure, subject to such freight and charges as might lawfully arise in respect of the premises, to wit, at the said southern district of New York aforesaid.

And whereas the said ship or vessel afterward, to wit, on the day and year last aforesaid, with all such passengers, goods, wares and merchandise in and on board of her as aforesaid, departed on her said intended voyage from Havre aforesaid, and also from Cowes

aforesaid, and at the respective times of her departure from Havre and from Cowes as aforesaid on such her said voyage, was tight, staunch and strong, had her hatches well and sufficiently caulked and covered, and was well and sufficiently manned, provided, furnished, watched, apparelled, officered, coaled and equipped, with all things needful and necessary for said voyage, to wit, at the city and county of New York aforesaid.

And whereas the said ship or vessel duly proceeded on her said voyage until afterwards, to wit, on the sixth day of December, in the year one thousand eight hundred and fifty-three, when being upon the high seas and having encountered head winds and heavy weather, which then and there retarded and delayed her progress on said voyage, it became and was expedient and necessary for the preservation of said ship or vessel, her crew and passengers, and the goods, wares and merchandise aforesaid, that the said ship or vessel should put into a certain port, to wit, the port of Halifax, to procure a quantity of fuel for the purpose of enabling her to pursue her aforesaid voyage, to wit, at the southern district of New York aforesaid.

And whereas the said ship or vessel then and there was accordingly steered and directed for Halifax, and by the perils of the sea, that is to say, by accidentally striking upon a sunken rock or some hard substance, was broken in her bows and bottom, and rendered leaky ; and while and thereafter proceeding on her course to Halifax aforesaid as a port of necessity, for the purpose aforesaid, the said ship or vessel listed and began to fill with water, so that there was then and there great and imminent danger that the said ship or vessel would founder, and with the said passengers, goods, wares and merchandise would become wholly wrecked and lost, to wit, at the southern district aforesaid.

And whereas, by reason of such impending peril, and for the purpose of saving therefrom the lives of the crew and the said passengers of said ship or vessel, and the said ship or vessel, and the said goods, wares, or merchandises, laden on board of her, or so much thereof as could thereby be saved from such loss, it then and thereby became expedient and necessary to change the course and direction of the said ship or vessel, in order to run her upon the nearest strand, shore, or rocks, and her master and commander did accordingly then and there run the said ship or vessel up, to, and upon the nearest strand, shore, or rocks, that is to say, at or near to Halifax aforesaid ; whereby and by means of the said voluntary stranding of the said ship or vessel by the said master, the said ship or vessel, her tackle, machinery, engines, and appurtenances, together with a large part of the goods, wares, merchandises, so laden on board of the said ship or vessel as aforesaid, became and were broken, bilged, sunk, destroyed, and wholly lost to the respective owners of the said ship, and of the same goods, wares, and merchandises ; but the said goods, wares, and merchandises, which the

said defendants were so entitled to receive as aforesaid, were then and there, by the said corporation, saved at great trouble and expense, to wit, at an expense of $76\frac{37}{100}$ dollars per cent. on the whole value of said goods; and afterwards, and in or about the month of January, in the year last aforesaid, were safely carried and conveyed by the said corporation to the said port of New York, ready to be there safely delivered to the said defendants; of all which premises the said defendants there had notice, to wit, on the day and year last aforesaid, at the district aforesaid, by reason of which premises the owners and persons interested in the last-mentioned goods, wares, and merchandises being benefited by such losses and expenses as aforesaid, then and there became liable to contribute to the said losses and expenses aforesaid, in general average; and the said corporation, as such owner and proprietor of the said ship or vessel, was then and there of right entitled to retain and hold the said last-mentioned goods, wares, and merchandises as aforesaid, until such contribution should be paid and satisfied. And whereas, afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand eight hundred and fifty-three, at the city of New York, in the southern district of New York aforesaid, the said last-mentioned goods, wares, and merchandises, then and there being in the actual custody of the said plaintiff, who then and there was the agent in that behalf of the said corporation, and held by him as such agent, they, the said defendants, did enter into and subscribe a certain agreement in writing, under their hands, to the tenor and effect following, that is to say:

"*Average Bond.*

"Whereas the steamship Humboldt, whereof D. Lines is master, having on board a cargo of merchandise, sailed from the port of Havre, bound for New York, and in due prosecution of her said voyage sustained serious injury by striking on the rocks off Halifax, causing her to leak so badly that they were obliged to run into Halifax harbor, and put her ashore, in order to save cargo, by which means certain losses and expenses have been incurred, and other expenses hereafter may be incurred, in consequence thereof, which, according to the usage of this port, constitutes a general average, to be apportioned on the said vessel, her earnings as freight, and the cargo on board said steamship. Now we, the subscribers, owners, consignees, agents, or attorneys of certain consignees of said cargo, do hereby, for ourselves, our executors and administrators, severally and respectively, but not jointly, or one for the others, covenant and agree to and with Mortimer Livingston, that the loss and damage aforesaid, and other incidental expenses thereon, as shall be made to appear to be due from us, the subscribers to these presents, either as owners, consignees, agents, or attorneys of certain consignees, of said cargo, shall be paid by us respectvely,

according to our parts or shares in the said goods, as shall belong or be consigned to us, or shall belong or be consigned to any person or persons with whom we are copartners, agents, or attorneys, or in any manner concerned therein, provided such losses and expenses aforementioned be stated and apportioned by Wm. H. Bird and John Neilson, average adjusters, agreeably to the established usage, laws and decisions of the courts of this State, and of the United States in similar cases. And for the true performance of all and singular in the premises, we do severally hereby bind ourselves and our respective heirs, executors, and administrators to the said Mortimer Livingston in the penal sum of fifty thousand dollars lawful money of the United States.

"In witness whereof, we have to these presents set our hands this twenty-seventh day of December, one thousand eight hundred and fifty-three."

And thereupon, in consideration of the premises, and *and* that he, the said plaintiff, at the special instance and request of the said defendants, should and would deliver, or cause to be delivered, to the said defendants the last-mentionod goods, wares, and merchandise, and should and would well and faithfully perform and fulfil the said agreement in all things, on his part, to be performed and fulfilled according to the tenor and effect of the said agreement, they, the said defendants, then and there undertook and faithfully promised the said plaintiff that they, the said defendants, should and would well and faithfully perform the said agreement in all things on their part and behalf, to be performed whenever thereunto afterwards requested. And the said plaintiff in fact says, that afterwards, to wit, on the same day and year, and at the place last aforesaid, he, the said plaintiff, at the special instance and request of the said defendants, did well and truly deliver to the said plaintiff the last-mentioned goods, wares and merchandises, and did cause the losses and expenses in the said agreement mentioned to be stated and apportioned by the said average adjusters in the same agreement for that purpose named in manner and form as therein prescribed; and the said plaintiff further in fact says, that the amount and proportion of such losses and expenses in the said agreement and in this count mentioned, which by such statement and apportionment was made to appear to be due from the said defendants according to their shares and parts in the said goods so to them deliverable and delivered as aforesaid, was the sum of five thousand three hundred and thirty-nine dollars and ninety-six cents, lawful money of the United States of America, as by the said statement and adjustment may more fully and certainly appear. And the said plaintiff further in fact says, that the said losses and expenses in the said agreement and in this count above mentioned, are one and the same, and not other or different, and that the amount of such losses and expenses which the owners and persons interested in the said goods, wares and merchandises so delivered

to the said defendants, were liable to contribute in general average as above in that behalf alleged, was the last-mentioned sum of money, to wit, at the southern district of New York aforesaid. Of all which premises the said defendants afterwards, to wit, on the day and year last aforesaid there had notice. Nevertheless the said defendants (although often requested so to do) have not as yet paid to the said plaintiff the said sum of five thousand three hundred and thirty-nine dollars ninety-six cents, or any part thereof, but to pay the same or any part thereof to the said plaintiff the said defendants have hitherto altogether neglected and refused, and still do neglect and refuse, contrary to the tenor and effect, true intent and meaning of the said agreement, and of the said promise and undertaking of the said defendants in that behalf made as aforesaid, to the damage of the said plaintiff of eleven thousand dollars, and therefore he, the said plaintiff, brings suit, &c.

And now at this day, that is to say, on the third Monday of October, in the term of October, in the year of our Lord one thousand eight hundred and fifty-five, until which day the said defendants had leave to impart to the said declaration, and then and there to answer the same, before the said judges of the circuit court of the United States aforesaid, at the City Hall, in the city of New York, in the southern district of New York aforesaid, came as well the said plaintiff by his attorney aforesaid, as the said defendants by Daniel D. Lord, their attorney; and the said defendants by Daniel D. Lord, their attorney, come and defend the wrong and injury, when, &c., and say, that they are not guilty of the said supposed grievances above laid to their charge, or any or either or any part thereof, in manner and form as the said plaintiff hath above thereof complained against them, and of this they put themselves upon the country, and the said plaintiff doth the like, &c.

And hereupon the process thereof is continued between the parties aforesaid of the plea aforesaid, in the same court, before the judges thereof, until the stated April term, in the year of our Lord one thousand eight hundred and fifty-six, to wit, on the twelfth day of May, in the same year, at the City Hall, in the city of New York, in the southern district of New York aforesaid, and the same day is given to the parties aforesaid at the same place.

At which day and place last above mentioned, before the honorable Samuel R. Betts, district judge, and one of the judges of the said circuit court of the United States, according to the form of the statute in such case made and provided, came as well the above-named plaintiff as the above-named defendants, by their respective attorneys above mentioned, and the jurors of the jury summoned to try the said issue, being called, also came, who, to speak the truth of the matters aforesaid being chosen, tried, and sworn, say upon their oath that the said defendants did promise in manner and form as the said plaintiff hath above in that behalf alleged, and they assess the damages of the said plaintiff by reason of the

premises over and above his costs and charges by him about his suit in this behalf extended to five thousand three hundred and thirty-nine dollars and ninety-six cents, and for those costs and charges to six cents.

And because the said court, before the judge thereof now here, are not yet advised what judgment to give of and upon the premises therefor, the process thereof is continued between the parties aforesaid in the same court until the stated October term thereof, in the year one thousand eight hundred and fifty-six, to wit, the fifteenth day of November, in the same year, at the City Hall, in the city of New York, in the southern district of New York aforesaid, and the same day is given to the parties aforesaid, at the same place, to hear the judgment of the court thereupon.

At which day, before the honorable Saml. R. Betts, judge of the district and circuit court of the United States aforesaid, come the parties aforesaid by their respective attorneys aforesaid, and bring before him a certain bill of exceptions taken and sealed on the trial of the issue aforesaid, and hereupon the said bill of exceptions in the prayer of the said defendants is entered on the record of the proceedings in this cause, and is enrolled in the words and figures following, to wit:

CIRCUIT COURT OF THE UNITED STATES,
For the Southern District of New York,
In the Second Circuit.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that in this stated term of April, in the year of our Lord one thousand eight hundred and fifty-six, to wit, on the twelfth day of May, in the same year, the issue within joined, between Mortimer Livingston, a citizen of the State of New York, plaintiff, and John Gourd and others, comprising the firm of Gourd, Freres, and Company, subjects of the Emperor of the French, aliens, defendants, came on to be tried in this court before the honorable Samuel R. Betts, district judge, one of the judges for this court; and the jurors of the jury in this behalf summoned also come, and as well the plaintiff by his attorney within named as the defendants by their attorney within mentioned also come; and the jurors in this behalf were duly chosen, hired, and sworn; and thereupon the counsel, learned in the law, of the plaintiff, to maintain the issue on his part, called as a witness Mortimer Fowler, who, being duly sworn and examined, on behalf of the plaintiff, testified as follows. On being shown the original average bond, witness says: I know the signature of Gourd, Freres, & Co. thereunto attached; it is in the handwriting of John Gourd, one of the defendants.

Being cross-examined, says: I was at the time clerk of the plaintiff, who was agent of the ship; the average bond was prepared

by Alexander Hamilton, jr., the counsel of the company who owned the ship, and was given to the average adjusters for signature by the consignees: Messrs. Bird & Neilson were the average adjusters, and were employed by the plaintiff; part of the cargo, including the goods consigned to the defendants, had arrived in the city and was in the public store, and was entered by the plaintiff; it was consigned to the plaintiff from Halifax, and this bond was required from the original consignees before the cargo was delivered to them here; the consignees were directed to call at the office of Bird & Neilson and sign the bonds before receiving their goods.

The average bond, dated December 27th, 1853, was then read by plaintiff's counsel, and is as follows:

Average Bond.

Whereas the steamship Humboldt, whereof Lines is master, having on board a cargo of merchandise, sailed from the port of Havre, bound for New York, and in the due prosecution of her said voyage sustained serious injury by striking on the rocks off Halifax, causing her to leak so badly that they were obliged to run into Halifax and put her ashore in order to save cargo, by which means certain losses and expenses have been incurred, and other expenses hereafter may be incurred in consequence thereof, which (according to the usage of this port) constitute a general average to be apportioned on the said vessel, her earnings as freight, and the cargo on board said steamship. Now we, the subscribers, owners, consignees, agents or attorneys of certain consignees of said cargo, do hereby, for ourselves, our executors and administrators, severally and respectively, but not jointly, or one for the others, covenant and agree to and with Mortimer Livingston, that the loss and damage aforesaid, and other incidental expenses thereon, as shall be made to appear to be due from us, the subscribers to these presents, either as owners, consignees, agents, or attorneys of certain consignees of said cargo shall be paid by us, respectively, according to our parts or shares, in the said goods, as shall belong or be consigned to us or shall belong or be consigned to any person or persons with whom we are copartners, agents, or attorneys, or in any manner concerned therein, provided such losses and expenses aforementioned be stated and apportioned by Wm. H. Bird and John Neilson, average adjusters, agreeably to the established usage, laws and decisions of the courts of this State and of the United States, in similar cases. And for the true performance of all and singular in the premises, we do severally hereby bind ourselves, and our respective heirs, executors and administrators, to the said Mortimer Livingston, in the penal sum of fifty thousand dollars, lawful money of the United States.

In witness whereof, we have to these presents set our hands, this twenty-seventh day of December, in the year of our Lord one thousand eight hundred and fifty-three.

Names.	Marks and numbers.	Value.
Gourd, Freres & Co.	GF C	

Being again examined on the direct, witness says: I know Captain Lines, master, and John H. Mars, chief engineer of the Humboldt; they sailed in the Arago, on the 4th of May, from this port, on a voyage to Havre, in France, and are now on the ocean.

The plaintiff's counsel then read in evidence the copies of the depositions of Captain Lines and John H. Mars, taken *de bene esse* in this cause.

UNITED STATES OF AMERICA,
Southern District of New York,
City, county, and State of New York, ss:

Be it remembered, that on this thirteenth day of November, in the year of our Lord one thousand eight hundred and fifty-five, I, R. E. Stilwell, a commissioner, duly appointed by the circuit court of the United States, for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil cases depending in the courts of the United States," passed February 20th, 1812, and the act of Congress, entitled "An act, in addition to an act, entitled "An act * * * ;" did call and cause to be and personally appear before me, at my office, in the city of New York, in the said southern district of New York, in the State aforesaid, David Lines, to testify and the truth to say, on the part and behalf of the plaintiff, in a certain suit or matter of controversy, now depending and undetermined, in the circuit court of the United States for the southern district of New York, wherein Mortimer Livingston is plaintiff, and John Gourd and others are defendants. And the said David Lines, being about the age of years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said David Lines, and he did thereupon depose, testify, and say as follows, viz:

I am a shipmaster, and have been so for twenty years, and have followed the seas since 1820; I knew the steamship Humboldt, formerly of New York, engaged as one of the mail steamers between Havre, South Hampton, and New York; she carried passengers, merchandise, freight, and also the mails. I commanded her from her first voyage, which I think was in 1851; she had made some eighteen voyages; I commanded her until the time of her loss; her

last voyage was from Havre, in France, to New York; she left Havre November 22, 1853, having on board the mails, 90 passengers, and from 4 to 600 tons, about 500 tons perhaps of merchandise; the vessel was well provided for the voyage in every respect; she had on board, I should say, 1,200 tons of coal; that was our capacity, when we had everything full, and we had everything full; independently of filling everything we had an extra quantity on deck in sacks; including all we had twelve hundred tons or thereabouts; according to my judgment and experience, we had a full supply; we had never taken a greater amount; after leaving Havre we made Cowes, our usual stopping place in England; I should think we had bad weather between Havre and Cowes, strong westerly winds with thick weather; we left Cowes on the 23d November about half-past three in the afternoon; our destination was thence to New York direct; we deviated from that destination; generally we had rough boisterous weather, strong westerly winds, from the time of our starting, say for the first ten or twelve days; on the 5th of December, on making an examination of our bunkers we found that the quantity of our coal was such that by the time we got off Halifax we should not have more than sixty tons of coal; this would have been insufficient to carry us to New York, and therefore I determined to put into Halifax for a supply: that measure in my judgment was indispensable for the safety of the ship; from that time, say noon of the 5th, I shaped my course for Halifax; accordingly on the morning of the sixth from four to half-past four o'clock I made Sambro light, which is on Sambro Island; when sighted, it was from 15 to 20 miles distant; I stood in the proper course to carry me into the harbor of Halifax having the light constantly in sight; the water being smooth and the weather clear and fine, about half-past six o'clock saw a flash light close by the ship, from a boat having the appearance of a pilot boat; I stopped the ship and shortly after a small boat came alongside with a pilot; on his coming on board I asked him if he was a Halifax pilot, and he replied that he was; I then asked him for his papers; he said he had left his boat in such a hurry that he had left them on board or in his coat pocket on board his boat; I asked him then if he knew where he was and how the ship was situated; he replied certainly, there is Sambro light, pointing to it; I asked him how far off he should judge it to be, and he said some 7, 8 or 9 miles; I told him I had judged myself that we were nearer in; he said that he could not be mistaken, he was a regular pilot and had been close in that morning, and had been running off and knew his time and speed; I then gave him charge of the ship; at this time it began to set in thick and hazy, so that you could see the shore, and Sambro light but indistinctly; I told the pilot then I was afraid it was going to be thick; his reply was, he thought it would soon be over, that there had been a fire the previous night at Halifax, the smoke of which a northerly wind had drifted over; then almost

immediately set in a thick fog, and Sambro light could not be seen; I then slowed the ship to half speed; I then told the pilot that if I had had no pilot on board I should stop the ship and haul her off; his reply was that the ship was a great deal further off than I supposed her to be, and that if I hauled her off I would do wrong; that the ship to be got into a proper position should be kept running, and if it continued thick after getting her in a proper position he would then stop her; she then continued on the course he gave at the same half speed, and after running from the time he came on board, say three-quarters of an hour, the ship struck a rock; at the time he supposed it was the Sisters, but subsequently we found that it must have been Bell Rock near Chebucto head; I stopped the engines immediately and then reversed them to back off; I dropped the lead and found that the ship was afloat, that she had stern way; I then stopped her, and then started ahead again and put the wheel hard-a-port, which turned our head to the eastward, being a direction seaward, to keep her off shore, and kept her head about east; whilst this manœuvre was progressing, I found that the vessel did not move as fast as I thought she ought, and called to the man at the wheel to know if the wheel was hard over; he replied that it was hard over, and at the same time I went to the stern and looked over at the rudder to see if everything was right; everything seemed right, and after stopping there a few seconds I saw that the ship began to go ahead, and at the same time I saw some pieces of broken plank come up to the surface of the water, which was the first notice that I had that anything serious could have occurred, at the same time an officer reported to me that he saw some pieces of plank sticking out at the bow; I went forward immediately to look over the bow and found broken pieces of plank sticking out at the bow at different parts under the water; after a moment's examination I turned to go aft, and on my way I met the chief engineer, John H. Mars, and he told me then that he had just come from below to make his report, and the water was coming in fast; I went below with him, and found, when I came to the forward fire-room, that from a large door of a coal bunker, that the water was standing in that bunker some four feet high, and was pouring over that door like a cascade; in this coal bunker there was a light hanging up and looking over the water in this bunker to the forward bulkhead, I could see that wherever there were seams the water was rushing in; from the quantity of water that I saw there, I was satisfied the bow must be broken off, or that a large aperture had been made; I then said to the chief engineer, to do all he could with the engines and his pumps; we both started and went aft into the engine-rooms, and when we came there the water was rushing along there like a rivulet, and had then got a large body of water; the ship apparently took a list, and the water settled on that side, which was the starboard side; I was satisfied, myself, from the water I saw there, and the rapidity it was coming

in, that it impossible to keep her clear with the pumps, that was my impression; I told the engineer that I must go on deck, that I trusted to him to do everything he could possibly do, and when affairs came to the worst, before abandoning the engine-rooms they must give me ten minutes' notice; I then went on deck; all this passed between us with great rapidity; almost immediately as I come on deck the fog lifted and I saw Chebucto Head; I altered the course immediately and stood up parallel with the coast, directing my course to Halifax, running along what I supposed to be about half a mile from the shore; I should observe that the lifting of the fog was momentary, it almost immediately shut in again and became thick; at this time I called all the officers of the deck to clear all the boats, and let them part of the way down; the ship at this time was listing fast, so as almost to bring one wheel out of the water, and her speed was diminishing; I suppose, from the time I left the engine-room and came on deck, half an hour might have elapsed; when the chief engineer came on the paddle-box where I was standing and told me the ship was filling so fast and so many of his fires were out, the men at that time working up to their armpits in water, that at the outside, he would have to abandon the engine-room in ten minutes; I then left the paddle-box and looked down the hatchway in the engine-room, and from the quantity of water I saw there, and the condition of the engine-room, I was satisfied that this report must have been correct; at this time the speed of the ship had been reduced very low, and she listed badly on one side; after looking at this, and a moment's reflection, I was satisfied that as soon as they deserted the engine-room, the vessel must lay there and become unmanageable, and fill and go down in deep water; and I altered the course immediately, nearly at right angles with her then course, right toward the shore, as the only alternative; at this time the fog was so thick that you could not see the length of the ship; I supposed myself to be from a quarter to half a mile from the shore; when I hauled in, I of course was in hopes that the fog would clear up, so that I could choose my position, and if possible put my ship in some safe place; the coast along there has many indentations, but owing to the fog continuing so thick, nothing could be seen; I then had no other alternative but to stand in, and let her bring up as she might; that was indispensable to prevent her going down in deep water; after thus standing in some ten or fifteen minutes on this course, the ship's bows brought up on a shelving rock; at this time it was still so thick that the shore could not be seen; when the ship's bow had got upon this rock I ordered the lead to be dropped over the bow and found three fathoms of water, and in sounding from there aft I found that it gradually deepened to about six fathoms under her stern; finding that it was a shelving rock, and fearing that the vessel might slip off into deep water, I ordered the engine to be kept going to fasten her on, which they continued

to do for a few minutes; in the course of some three hours she settled down on this shelving rock, so that she touched the rock all the way to her stern; some fifteen minutes after she touched the rock the fog lifted, and we found that she was about 300 feet from a cragged rocky shore, a short distance to the northward of Portuguese Cove; this was on Tuesday that we went on shore; the weather remained unaltered and the sea smooth until the following Sunday; up to that time I had not given up hopes of saving the ship; on Sunday a swell set in from the eastward, and I found then, from the working of the ship under the influence of the swell, that different parts were giving way, and she was breaking up; on the following Tuesday night a blow set in from the eastward, the sea broke up the ship's deck from the mainmast forward, and the hull of the ship split from the stern, so that one side fell one way, and the other the other way into the water, the afterpart of the ship still holding together; a week or ten days elapsed, and a heavy gale set in and broke the ship entirely up, so that where she was wrecked not a particle could be seen, except some of her machinery could be seen under water; the rest of her was scattered about in fragments along the coast.

Q. From the time the vessel brought up on the rock, what was done for or in reference to the cargo?

A. The first thing that was done after I touched, I lowered the boats and put men into them; the same time that I gave this order, I hired a shore boat, and sent a messenger in her to Halifax, with orders to charter a steamboat and lighters, and send them to the ship; I gave him a telegraph dispatch to send to New York, announcing our condition; that being done, the captains of a couple of smacks, who lay at anchor near by, came alongside; I chartered these to come alongside; I put into them the mails, baggage and such of the valuables as I could get at; I mean watches, jewelry, specie, and such; put a man on board of each to watch the property; in the meantime passengers were going into the ship's boats, where they remained until the steamer came from Halifax; I had some spare boats, and I occupied the rest of my boats and men in getting hawsers and chains out and fasten to the rocks to prevent the ship sliding off; until the vessel finally broke up, we employed all hands, and all we could advantageously employ of the shore people, night and day, as the tides would permit, in saving anything that we could, cargo and materials of the ship.

Q. When you changed your course for the last time, as above stated, what was your object?

A. My object was to run her ashore to prevent her from going down in deep water, and for saving the lives and property on board.

Q. Was the Humboldt, when she sailed on that voyage, a good strong and staunch vessel, and altogether seaworthy?

A. Yes, sir; and none more so.

Q. You have mentioned the winds; were they adverse, head winds?

A. Yes, they were.

Q. What was the ordinary length of a voyage to New York at that season of the year?

A. Twelve to fourteen days.

Q. Was the wind unfavorable in an ordinary or unusual degree?

A. In rather an unusual degree; it was what we would call a boisterous passage; strong westerly winds.

Q. In taking in your supply of coal, was it calculated or intended to take you to New York?

A. Yes, sir.

Q. Under any ordinary circumstances, was it sufficient for that purpose, in your judgment?

A. Yes, sir.

Q. You say you sent a dispatch to be telegraphed from Halifax to New York; look at that paper now shown you, and say whether you believe that to be the message which you sent.

A. What precedes the words Capt. Lines, is the dispatch I wrote in my cabin, and sent by Doctor Stewart to Halifax to be telegraphed; the rest I suppose to be his. (The dispatch is as follows, the original is in the possession of Mr. Hamilton, retained by consent:)

"Halifax, 6th.—Mortimer Livingston, N. Y.

"Ship Humboldt on coming into Halifax this morning for coal, in charge of a pilot, struck a rock off Sambro, and knocked a part of the bow off; was obliged in the fog to run her on shore ten miles below town, to keep her from sinking, where she now lies part full of water, the bow in three fathoms, and stern in six fathoms. Should the wind come to eastward, her fate is doubtful. Eleven half, a. m., Capt. Lines sent me up with above dispatch. Left Cowes, Nov. 22d, 3.30, p. m. Heavy seas, head-winds all the way. 90 passengers, four hundred fifty tons freight. Consul and Cunard gone to ship with steamer. Another steamer getting ready to go down with lighter. Advise Mrs. Stewart.

"F. Campbell Stewart."

The place where the vessel went down is about 12 miles from Halifax.

Cross-examined:

Q. At the time when you struck the shore, was there any swell of the sea to damage the ship?

A. No, sir.

Q. Do you know at what time of tide it was?

A. About a quarter ebb.

Q. Do you know about how high the tide rises and falls at that spot?

A. I am not positive.

Q. To what degree of speed had your ship been reduced when you struck the shore?

A. I should say from 2 to 3 miles an hour—2 miles perhaps when she struck.

Q. Did you examine the wound in the ship to ascertain its extent and position that day?

A. Yes, sir.

Q. Please describe it.

A. The stem was broken off from the bottom up to about the 11 foot mark, and the keel about 20 feet from the stern, and the course of the ship between those points was smashed up generally, planking and timbers; there was a general breaking of the timbers and planking.

Q. Was this so on each side of the ship?

A. It was apparently so, as much on one side as the other.

Q. From the time of your striking the rock at sea, and the time of your striking the rock at the shore, did you ascertain how fast the water gained on her by sounding in your ship.

A. No, sir; it was not necessary to do that.

Q. Did you ascertain in any manner how fast the leak gained on you; how much time per foot of leak?

A. The leak gained on her 6 to 8 feet in less than an hour's time.

Q. At the time you say you last changed your course to the shore, had you any idea at what part of the coast you would strike?

A. Yes, sir; I suppose some two or three miles to the northward of Chebucto Head.

Q. At the time of your last turning your course, how far did you suppose yourself from the shore?

A. From a quarter to half a mile.

Q. Immediately previous to your last turning your course, were there any appearances of the fog lifting, and what were they?

A. There were no appearances of the fog lifting; it was very thick; you could not see the length of the ship.

Q. Have you ever been on that particular coast before, between Halifax and Sambro Harbor?

A. I would answer between Sambro Harbor and Halifax, No, sir; but I have been twice before in and out of Halifax.

Q. Did you know anything previously of the shore between Chebucto Head and Portuguese Cove?

A. Nothing particularly; no more than a general idea that we got from consulting the chart and pilot.

Q. Had you any, and what chart of the part of the coast between Chebucto Head and Portuguese Cove?

A. We had at the time Blunt's Chart of the United States, including Nova Scotia, which had a separate chart or plan of the

harbor of Halifax; I had, independent of those, the Harbor Chart of Halifax, published there, and Blunt's Coast Pilot.

Q. Did you not understand at this time that the coast between Chebucto Head and Portuguese Cove was a rugged, rocky coast with bold deep water up to it?

A. That was my general impression.

Q. From the time of your striking the rock at sea to the time when you say you turned your course to the shore, what was the rate of your speed in your damaged ship?

A. I should say that it might have been from the time of starting six miles, gradually reduced down to two.

Q. What was your rate of speed after the fog came on and you got your pilot, up to the time of striking the rock at sea?

A. After the fog came on, until striking the rock, five to six miles per hour.

Q. When you first made Sambro Island light, how did it bear from you and at what distance.

A. I should think at the time of making Sambro light, it was about northwest northerly, and 15 to 20 miles distant.

Q. What had been your course from noon of the preceding day up to your making Sambro light?

A. I don't recollect.

Q. Was your speed the usual rate of speed, and how many knots per hour?

A. I should say the usual rate, and as the night was fine and water smooth, I should say 11 knots per hour.

Q. Who kept the ship's log-book, and where is it?

A. J. T. Prentice, the first officer; where it is, I don't know; I think, as far as I know positive, it was at the consul's office at Halifax.

Adjourned to 11 a. m. to-morrow.

Q. Was there, in addition to the sea log-book a log-book of the engineer, and where is that?

A. Yes, sir, and is in Mr. Hamilton's possession.

Q. What were your courses from the time you took the pilot on board as you recollect?

A. I should think the first order the pilot gave was to keep the ship north-northwest, on which we sailed a very short time, then north-northeast; we continued on that from a half to three-quarters of an hour to the time we struck.

Q. How did you conclude that the rock upon which you struck was not the Sisters but the Bell Rock?

A. I came to that conclusion, more particularly after the ship was run on shore, from examining the charts and the time we had run on the different courses, and the proximity in which we were to Chebucto Head when the fog lifted; likewise from the report of a

pilot on thaf morning shortly after the vessel struck; he had seen pieces of broken plank in the vicinity of Bell Rock, which, as he said, from the way the tide was setting, could not have come from the Sisters.

Q. How did the Sambro Island light-house bear from you when you took on board your pilot, and at what distance, as you estimated?

A. I should think northwest or northwest westerly; I estimated the distance myself when I took the pilot from four to five miles, but the pilot said it was greater; I think he first said we must be double that distance, some eight or nine miles.

Q. How long did you see Chebucto Head that morning when the fog lifted, and how near to it were you as you estimated?

A. I suppose we saw it from one to three minutes, and the distance from half to three-quarters of a mile; I should suppose it must then, when I first saw it, bear north-northwest.

Q. After seeing Chebucto Head, did you lay your course by compass, or by what other means?

A. By compass. The course by compass was north by east.

Q. Did you by that course intend to hug the land?

A. I intended not exactly to run parallel with it, but to draw in a little.

Q. From the time you made Sambro light-house to the time your ship first struck at sea, did you heave the lead, and how often, and what soundings did you get?

A. From the time of making Sambro light until taking the pilot on board, the weather was perfectly clear, and there was no occasion for heaving the lead, and we did not; and after the pilot took charge, the lead was not hove until after we struck Bell Rock, and then it was hove to determine whether we floated or not.

Q. After you made Chebucto Head to the time your vessel struck, did you heave the lead?

A. No, sir.

Q. How much below the water was the eleven foot mark as it existed before she struck Bell Rock?

A. I should say five feet.

Q. At the time you diverged and bore for Halifax, you say you formed a judgment as to the sufficiency of the coal to take you to New York: How many days did you judge it would take you to reach New York, supposing you had a sufficiency of coal?

A. Allowing the chance to be a very favorable one, two days and a half, subject to the ordinary contingency of a voyage at that season.

Q. Do you know what is the ordinary length of the steamers' passages from Halifax to New York, at that season of the year, with sufficiency of fuel?

A. Ordinary circumstances, I think, about forty-eight hours.

Q. Did you not make a protest at Halifax, signed by yourself?

A. Yes, sir.

Q. In that protest did you say anything about adverse winds and a boisterous passage, and did you not there state that from leaving Cowes to the sixth day of December, nautical time, nothing material occurred on board the steamer?

A. There was nothing said about adverse winds or boisterous weather, and it is stated in the protest that nothing material occurred on the voyage. I might further state that the protest was made by the consul, who had the log-book, and could make what extracts he pleased from it, and which showed the state of the weather.

Q. Who kept the engineers' log-book?

A. John H. Mars, chief engineer.

Q. In whose service is Mr. Prentice, then your first officer, and Mr. Mars, then your chief engineer?

A. They are now in the employ of the New York and Havre Steamship Co., in the ship Arago, in the same capacity, which ship is now under my command.

Q. About what time of day on the 22d November did you sail from Havre?

A. We left Havre Roads about four or half-past four in the afternoon.

Q. What is the ordinary length of your passage from Havre to Cowes?

A. About ten hours.

Q. Is it usual for you to carry your coal on deck, and to what extent in quantity?

A. In the Humboldt, in winter voyages, I always carried a quantity in sacks on deck, say from twenty to forty tons, that is, in coming this way, and that was about the quantity I had on deck this time.

Q. Where did you take in your coal for this voyage?

A. At Havre.

Q. What description of coal was it?

A. Bituminous coal; I can't exactly tell you the proportions of it now, but six or seven hundred tons was the Welch or Cardiff coal; the other was the Newcastle?

Q. Do you speak of the quantity and description of coal from your own knowledge, or in any degree from the report of your officers?

A. From both.

Q. What was the daily consumption of coal when you used Cardiff?

A. From 70 to 90 tons, according to the weather.

Q. What was your daily consumption when you used Newcastle?

A. I should think, from 90 to 100.

Q. Was not the range greater than 90 to 100 tons when you used Newcastle?

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Q. What was your daily consumption when you used Newcastle?

A. I should think, from 90 to 100.

Q. Was not the range greater than 90 to 100 tons when you used Newcastle?

A. It is possible, but I can't say as well as the engineer; it was reported to me daily; but these reports were lost in the ship.

Q. What was the name of the man whom you took on board as pilot?

A. I don't recollect.

Q. Did you ascertain that he was not a pilot afterwards?

A. Yes, sir.

Q. Was he when he came on board perfectly sober, in your judgment, or not?

A. Perfectly so.

Q. Did not your passage, commencing Oct. 28, 1852, at Havre, terminate at New York on the 11th November of the same year, being 15 days?

A. I don't recollect.

Q. Did not your passage, beginning December 24, 1852, terminate on the 10th of January, 1853, being 18 days' passage?

A. I don't recollect; it can be easily ascertained at the office, or from the arrivals.

Q. Did you not consider the passage between the months of October and March a favorable passage, if it did not consume more than 14 days?

A. Yes, sir; a fair passage.

Direct resumed:

Q. You speak of having lost some papers in the ship; to what extent were your own books, papers and memoranda lost?

A. All my private logs, journals and memoranda were lost; they were in my state-room, which was in the after part of the vessel; they were lost there, or in some way before reaching Halifax, so that they did not come to my hands.

D. LINES.

Q. You say you ascertained that the man whom you took on board as a pilot was not a pilot. How did you ascertain that, and did you ascertain anything on that subject except by hearsay?

A. It was only by hearsay; the man who came on board at Portuguese Cove, after the ship was on shore, represented himself as a pilot, and said in the presence of the first man that he was not a pilot, to which the first man replied, You are a liar; I am as much of a pilot as you are; but after I got up to Halifax, Mr. Cunard, and the American consul, and others, informed me that the first man was not a pilot. This was the only way I ascertained the first man was not a pilot.

The plaintiffs' counsel objected to the hearing evidence as to the want of qualification in the first man.

D. LINES.

UNITED STATES CIRCUIT COURT,
Southern District of New York.

MORTIMER LIVINGSTON
vs.
JOHN GOURD and others.

Deposition of John H. Mars, a witness, produced, sworn, and examined, on behalf of the above plaintiff, taken by consent, on the sixth day of March, 1856, conditionally:

SOUTHERN DISTRICT OF NEW YORK, *ss:*

I am an engineer; I am now chief engineer of the United States mail steamship "Arago." The Arago leaves for Havre on Saturday, March 8, 1856, at mid-day, and I am going in her as chief engineer; she will return to the port of New York from Havre in about six weeks; I have been employed as engineer on board of steamers for many years, and have been chief engineer in charge of steamers for some ten or twelve years, of which I was three years in the mail steamer Washington, about eighteen months in the Franklin, and nearly the same time in the Humboldt. I joined the Humboldt, as her chief engineer, about the month of May, 1852, and continued in her as such until she was lost, at or near the entrance of the harbor of Halifax, in December, 1853. On this voyage, in which she was lost, the Humboldt left Havre November 22, 1853, having on board a full complement of men in the engineer department, and with 1180 tons of coal on board, which filled all her coal bunkers, and a number of sacks which were carried on deck. There may have been forty tons on deck; of this quantity of coal about one-half was Cardiff coal, and the remainder was Newcastle coal. She stopped at Cowes as usual, to receive passengers and mails, and left there November 23d, at 3½ p. m., taking the usual course for New York. The weather was very boisterous, with head winds almost incessantly, retarding the vessel's progress. This lasted for ten or twelve days; after passing the Banks the weather was more favorable, but we had very little of it. On the 5th of December an examination of the quantity of coal on hand was made by myself and Capt. Lines, and the result of the examination was, that we had not coal enough on board to go beyond Halifax with safety; and when we were off Halifax, we had only from forty to fifty tons of coal left. The captain then determined to put into Halifax for a supply of coal. On Tuesday morning, December 6, 1853, I was awakened by a concussion, followed by a sound like the crushing of timber; immediately after I heard the engines stop; I arose at once, and went down into the engine-room. The assistant engineers were then engaged in backing the engines; I asked them if the pilot was on board; they replied that he was. I then went below to the after fire-room, and

looked into the bilges, to see if there was more water than usual; there was not. I then started for the working floor of the engine-room, but as I reached the stairs, the assistant engineer in charge came aft from forward, and said he wished me to go forward, as the ship was making water very fast. I then went forward to the forward coal hole; I saw the water running through the bulkhead that divided the forehold from the forward coal hole; it was running through every seam and crevice. From there I went on deck to inform Captain Lines. When I found him, I stated that the ship was making water, a great deal of water, and requested him to come down and see it. The captain and I went down together to the forward coal bunker—found the water running over the sill of the door leading from forward bunker to the fire-room. The sill was about thirty inches high. The captain asked me if I could keep her free. I said I could not tell till the water reached the pumps. He then told me to let him know about a quarter of an hour in advance of the time we should have to leave the engine-room. He, the captain, then went immediately on deck, and I went into the engine-room. The water then had reached the bilge injections, and there was about two feet of water over the floor of the ship. We then applied the bilge injections, and we took out the water. This happened once or twice. That is, the water came in, and the bilge injections, with all the pumps that we could apply, overcame the water. This might have occupied eight minutes or less. After this it continued to rise gradually and fast. It rose above the lower furnaces, and up to the ash-pits of the upper furnaces. With the exception of once going on deck to look round, I remained constantly in the engine-room; the men in the after fire-room were standing up to their arm-pits in water, and there was still deeper water in the lee bilge, perhaps 6½ feet. After that I went on deck to see the captain, and report to him. He was standing on the port paddle-box; the pilot was near him. I told him that all our lower fires were out, and that in ten to fifteen minutes the upper fires would be out; we should have to abandon the engine-rooms, and the engines would stop. He didn't reply, but looked to the pilot. The pilot said, if we could keep on half an hour or so, we could get up to Halifax. I repeated to the captain what I first said, with all the emphasis I could put on it. He then told the pilot to put the ship ashore, or run her ashore; I don't remember the exact words; it was one of these two phrases. I went immediately back to the engine-room, but before I went I heard the pilot give a course from that we had been running to another. I was asked by one of the assistant engineers, after my return to the engine-room, what they were doing on deck, and I replied they were running her on shore. I remained in the engine-room, where we had all the pumps working, and the bilge injections, and the water kept rising. As near as I can judge, from twelve to fifteen minutes after my return to the engine-room, I felt the ship

sliding or grating upon something, and then bring up. The engines were in operation while she was so sliding, after she brought up. I can't say exactly how long the engines worked after she brought up. I have not a very accurate idea of the time; may have been from two to five minutes.

Q. Give a statement of the commencement and termination of each of the winter passages, from Havre to New York, which you made in the Humboldt?

A. On the ninth voyage of the ship the passage homeward commenced from Cowes, October 29th, 1852, at four o'clock a. m., sea-time, and terminated at New York, on November 11th, at nine o'clock a. m., sea-time, making a thirteen days' passage, in round numbers. On the tenth voyage, the passage homeward commenced at Cowes, Saturday, December 25th, 1852, at ten o'clock a. m., sea-time, and terminated at New York, January 10th, 1853, at eight o'clock a. m., sea-time, making a sixteen-day passage. On her eleventh voyage, the homeward passage commenced at Cowes, on Thursday, February 18th, 1853, at half-past three o'clock p. m., sea-time, and terminated at New York on March 1, 1853, at nine o'clock a. m., sea-time, making a passage of twelve and a-half days. On her fifteenth voyage, her passage homeward commenced at Cowes, on Saturday, October 1st, 1853, at half-past seven o'clock p. m., sea-time, and terminated at New York on Saturday, October 15th, 1853, at midnight, or 12 p. m., making a passage of thirteen days and a half. On her sixteenth voyage, the homeward passage commenced at Cowes, on Thursday, November 24th, 1853, at half-past three o'clock p. m., sea-time, and terminated on Tuesday, December 6th, at half-past seven o'clock a. m., being the voyage in question.

Q. What is the average time of these voyages? Thirteen days and six-tenths of a day.

Q. Please to state what was the consumption of coal on board of the Humboldt, on each of the winter homeward passages of which you have spoken?

A. Ninth voyage, 933 tons; tenth voyage, 1008 tons; eleventh voyage, 1000 tons; fifteenth voyage, 1088 tons.

Q. What does this show to be the average consumption for a winter passage homeward?

A. It averages 1024 tons.

Q. Why did you not coal for the last passage entirely with Cardiff?

A. We could not get it.

Q. Did you take on board all the Cardiff coal that could be procured prior to your departure?

A. We did.

Q. Had any circumstance occurred to diminish the stock of Cardiff coal procurable at Havre at that time?

A. There had; head winds to the vessels bound for Havre from England with coal for us, had prevailed an unusually long time.

Q. From your acquaintance with the Cardiff and Newcastle coals respectively, what do you consider to be the difference between them?

A. I should think that the Newcastle was about twenty per cent. inferior to the Cardiff.

Being cross-examined by the defendants' counsel:

Q. How many and what pumps had you in operation when you attempted to free the ship?

A. We had the two usual engine bilge pumps, two Worthington steam-pumps, and the two bilge injections.

Q. What was the aggregate capacity or power of those pumps?

A. I suppose, with all those pumps together, at the speed at which we were going, there might have been thrown eighteen hogsheads per minute; this is a rough estimate, as near as I can get without going into figures.

Q. What was the depth of water in the ship at the time it had risen to the ash-pits of the upper furnaces?

A. About $6\frac{1}{2}$ feet.

Q. How many revolutions did the engines make before making for Halifax?

A. On the fifth of December, 1853, the engines were making an average of $12\frac{68}{100}$ revolutions per minute.

Q. Between the time of your reporting to Capt. Lines, and the grating or sliding of the ship referred to by you, how many revolutions per minute did the engine make?

A. We were making from 8 to 9, as near as I can remember, and decreased to 7 at the time we ran ashore.

Q. Were the engines at the time last referred to shut off or working to their full capacity?

A. To their full capacity.

Q. What was the occasion of their diminished action?

A. It was owing to all the lower fires being extinguished, and there being a heavy list to port on the ship.

Q. To what degree had she listed?

A. I should think the deck stood at an angle of 20 degrees.

Q. What effect had this upon the paddle-wheels?

A. I could not see, but I could judge that one paddle was nearly out of water, and the other correspondingly submerged.

Q. In stating the dates of departure on the several homeward passages, you have mentioned the days on which the ship left Cowes; why do you adopt them as the date of departure instead of giving the dates of leaving Havre?

A. I can give no other reason than this, except that we compare our trips with steamers going to Liverpool by the arrivals and departures from Cowes.

Q. Do you treat Havre or Cowes as the port of departure?

A. In estimating the time of crossing, we always treat Cowes as the port of departure.

Q. At the time of leaving Havre roads, on the last passage, how much coal was then unconsumed?

A. Eleven hundred and forty tons.

Q. At the time of leaving Cowes, how much coal had you on board?

A. One thousand and eighty tons.

Q. Did or not the Newcastle coal consume very rapidly in comparison with the Cardiff?

A. It consumed more rapidly than the Cardiff.

Q. Was the following entry in the log under date of Nov. 23d, as follows: "Burning Newcastle coal, which consumes very rapidly," made by you at the time?

A. It was made by me at that time.

Q. Was your attention at the time particularly attracted to its rapid consumption?

A. It was.

Q. How long after that was it that the ship left Cowes?

A. It was 21 to 22 hours.

Q. At what distance was Southampton from where the ship lay at Cowes?

A. I should think about 15 miles.

Q. Could not Cardiff coal have been procured at Cowes and Southampton, or one of them?

A. It is very uncertain.

Q. Was any effort made whilst at Cowes to procure any Cardiff coal?

A. Not that I was aware of.

Q. Look at the entry in the log under date of Nov. 25, as follows: "Had to shut the damper to save fuel (Newcastle); with the damper wide open and head wind, we would burn about 105 tons per 24 hours; under similar circumstances, would burn 85 tons of Cardiff; ships making long voyages should never take Newcastle at half the price of Cardiff, if the latter can be had." Was the whole of that entry written by you at the time?

A. It was.

Q. Does it truly correspond with the facts and with your judgment at the time?

A. It did correspond at the time with the facts and with my judgment.

Q. Look at the entry in the log under date of Tuesday, Dec. 6, 1853: "6.43 a. m., stopped for pilot; 6.52 min., under weigh; 7.06 min., slowed the engines; 7.10, struck on the rocks known as 'The Sisters' three times, stopped and backed; got under weigh again and found that the ship was making water so fast that it was impossible to keep her free with the two steam-pumps and both

injections on the bilge, when it was determined to run her ashore to prevent her from sinking, when she struck at 7.35 in 2½ fathoms forward and 5½ aft;" and state whether it was made by you, and if so, at what time?

A. This was copied from the log slate in the engine-room kept by the engineer of the watch; it was copied into this log-book by the first assistant; I presume he copied it on shore the day after we struck.

Q. Was any and what part of the entry on the log-slate just referred to made by yourself?

A. Part of it was made by me; that part of the entry beginning with the words "And found" down to and including the words "5½ aft," with which the entry closes.

Q. Are the facts stated in that part of the entry which you wrote true as therein stated?

A. They are, to the best of my judgment.

Q. State the precise quantity of coal remaining on hand at the time the vessel struck on the rock?

A. Per account in the log 46½ tons, which I believe to be substantially correct.

Q. On the 10th passage home, which terminated in New York on the 10th Jany., 1853, how much coal was then remaining on board?

A. Per log account there was 207 tons, which I believe to be substantially correct.

Q. When you commenced lighting fires at Havre on that passage homewards, what quantity of coal had you on board?

A. 1215 tons.

Q. Do you consume more or less coal when the wind is ahead and blowing heavy than when the weather is moderate?

A. We have to use our judgment to prevent the consumption when the wind is ahead and blowing heavy, for with the wind thus, the draft would be very much increased and the consumption accordingly.

Q. What precautions do you adopt to prevent the consumption of fuel under the circumstances referred to by you?

A. They are various; we partially close the dampers, turn off the ventilators, or in an extreme case we extinguish some of the fires; by an extreme case I mean a heavy gale of wind, when the draft becomes so strong and the steam generated so much that we cannot work it off through the cylinders; in which case we must put out some of the fires or allow the steam to rise higher; the latter is not deemed prudent.

Q. Is it not usual to ease the ship in heavy head seas and adverse winds by moderating the action of the engines, or slowing them as it is called?

A. It is when safety of ship or engines require it.

Q. Is not the consumption of steam and consequently of coal less while the engines are slowed than when in full action?

A. It is less.

Q. Is it not apt to strain the ship and the engines by driving the vessel into a heavy head sea with the full power of the engines?

A. I must answer for the Humboldt herself in this case, because it depends on the relative power of the engines to the strength of the ship; I never saw any weather while on the Humboldt wherein I thought it necessary for the safety of the ship or engines to slow the engines.

On further direct examination:

Q. In expressing the opinion that ships making long voyages should never take Newcastle coal at half the price of Cardiff, if the latter can be had, did you confine yourself to the relative utility of the coal, or did you not take into consideration the greater space occupied by the Newcastle in the place of freight?

A. I took into consideration the greater space occupied by the Newcastle.

JOHN H. MARS.

Sworn to before me, this 8th day of March, 1856.

R. E. STILWELL,
U. S. Comm'r.

We hereby consent that the within deposition, as sworn to, be read on any trial or argument of the within cause with like effect as if taken before a commissioner of this court; that the same need not be filed, but may remain in the possession of the plaintiff's attorney, a copy to be furnished to defendants' attorney.

D. LORD.

March 8, 1856.

The Revised Statutes of Nova Scotia were then produced, and put in evidence by the plaintiff's counsel. The same may be referred to by either party on the argument.

William H. Bird, a witness produced, sworn, and examined on the part of the plaintiff, testified as follows:

I am an average adjuster in the city of New York, one of the firm of Bird & Neilson.

We made an adjustment on the Humboldt at the request of the plaintiff. The book before me is the average statement made by us. (Either party may make such extracts therefrom on the argument as they may deem necessary.) Witness says: We made this up according to the best of our judgment and understanding; we made this up according to the usages, laws, and decisions of the courts of New York and of the United States, as we understood them to be.

The amount chargeable to the defendants, according to the ad-

justment is $5,339 96-100, with interest from the ninth day of January, 1855.

Being cross-examined, says:

We took the facts in relation to the loss from statements from the protest.

Protest shown to witness and identified by him.

CONSULATE OF THE UNITED STATES OF AMERICA,
Province of Nova Scotia, Port of Halifax.

By this public instrument of protest

Be it known and made manifest to all whom it doth or may concern, that on this sixteenth day of December, in the year of our Lord one thousand eight hundred and fifty-three, before me, Robert Wilson Fraser, consul of the United States for the port of Halifax, personally came and appeared David Lines, master of the steamship Humboldt, belonging to the port of New York, in the United States of America, of the burthen of twenty-one hundred and eighty-one five ninety-fifths tons, or thereabouts; and with him also came John T. Prentiss, first officer; Charles Fisher, second officer; John H. Mars, chief engineer, and Philip L. Mars, first assistant engineer, of and belonging to the said steamship Humboldt, who, being severally sworn, did declare and depose that the said steamship, Humboldt, being laden with a cargo of general merchandise and passengers, they, the said appearers, made sail and departed in and with the said steamship from the port of Havre, in France, bound to New York, via Cowes, in Great Britain, on the twenty-second day of November, in the year one thousand eight hundred and fifty-three. That in the prosecution of said voyage nothing material occurred, until Wednesday, the twenty-third day of November, when at 2.30 a. m., made the Nab lightship, and lay off and on until daylight. At 7 a. m., resumed speed, and at 8.45 made fast to the yacht buoy off Cowes. Thursday, November the 24th, commenced with fine weather, and moderate breeze from south-southeast, the ship laying at the buoy off Cowes. At 3 p. m., received the English mails on board, and at 3.30 left Cowes for New York. That from this time until Tuesday, the sixth day of December, in the year as aforesaid, nothing material occurred on board.

That Tuesday, the said sixth day of December, commenced with moderate west wind, the ship by observation being in latitude 29° 44′ north, and longitude by chronometer 58° 55′ west, where, finding the stock of fuel insufficient to last the voyage to New York, it was determined to go into Halifax for a supply. Throughout the night the wind and weather continued moderate. At 4.30 a. m., made Sambro Light, bearing northwest, twenty miles distant. At 6.30 took a pilot, Sambro Light then bearing northwest five or

six miles. Very shortly after it set in thick fog and calm; ship going at half speed, and steering from northwest to north-northeast. At 7.15, struck on a sunken rock, supposed to be the Bell rock, which broke off part of the bow. Examined the ship, and found the water coming in fast. Called the hands and set the pumps to work, and got the pumps ready. Just after sighted Chebucto Head, and hauled up for the harbor. Almost immediately set in dense fog, and finding the ship filling rapidly and listing badly, the engineer also reporting that he would have to leave the engine-room in ten minutes, hauled at once in for the land, for the preservation of life and property.

About 8 a. m. the ship grounded, the bow being in three and the stern in six fathoms of water; but owing to the denseness of the fog, could not see the land. About fifteen minutes after, the fog lifting, discovered the shore, and found we were at a short distance from Portuguese Cove, on the rocks. Sent a dispatch immediately to the consul, at Halifax, for assistance. Two schooners being near, hired them to take on board the passengers' baggage, mails, and such other valuables as could be got, at once embarked the passengers in the ship's boats.

In about three hours after, the ship had settled by the stern, so that the after-part of the saloon-deck was under water. In the course of the afternoon, civil time, the consul arrived with two steamers, and came alongside and immediately received on board the passengers with their baggage, the mails, and such part of the cargo as we were enabled to get out, which, with a portion of the crew, they started for Halifax.

During the night, strong southerly gales and a high rough sea. The ship lifting and rolling, and apparently suffering much in her bottom. That during Wednesday, Thursday, Friday, and Saturday, the weather and sea were much more moderate, during which days as many men were hired as could possibly be got, and with the remaining portion of the crew, were all engaged in saving cargo and materials from the wreck.

Sunday, a moderate easterly wind, but very rough easterly swell. Ship suffering much, and part of her bottom apparently breaking up. During the day all hands employed saving whatever could be got at or removed.

Monday, rough easterly swell. The ship breaking up in various parts. All hands employed as before, in saving property.

Tuesday, various parts of the ship fast giving way, the heavy swell continuing. During the night the forward part of the ship, from the stem to the mainmast, separated fore and aft. The various decks and inside work breaking to pieces, making the ship a total wreck. Up to this time, the officers and portion of the crew remaining on board were doing all that was possible for the preservation of property.

That on the fourteenth day of December, the said first-named

deponent having arrived at Halifax, did, within twenty-four hours thereafter, note for protest, before Robert Wilson Fraser, the consul, to be extended, if occasion should require. And the said appearers did further severally declare that the said steamship Humboldt, at the time of her departure from Havre and Cowes, as aforesaid, was tight, staunch and strong; had her hatches well and sufficiently caulked and covered; was well and sufficiently manned, provided and furnished with all things needful and necessary for said voyage; and that during the said voyage the said appearers and the residue of the crew used their utmost endeavors to preserve the said steamship and her cargo from damage.

And, therefore, the said David Lines did declare to protest, and by these presents he doth solemnly protest, against all and every person or persons whomsoever it doth or may concern; and doth declare that all damages, losses and detriments that have happened to the said steamship Humboldt, and her cargo, are and of right ought to be borne by the merchants and freighters interested, or their respective underwriters, or whomsoever else it doth or may concern, by way of average or otherwise, the same having occurred as before set forth, and not by or through the insufficiency of the vessel, the neglect of him the said appearer, or of either of the mariners belonging to said vessel.

In witness whereof, the said appearers have hereunto subscribed their names, in presence of me, the said consul.

(Signed) DAVID LINES,
JOHN T. PRENTISS,
CHARLES FISHER,
JOHN H. MARS,
PHILIP L. MARS.

All which matters and things were declared, alleged, and affirmed before me, the said consul.

In testimony whereof, I have hereto set my hand and affixed my official seal. Day and date as hereinbefore written.

(Signed) R. W. FRASER,
[L. S.] *U. S. Consul.*

We valued the ship at $425,000, at the time of the disaster.

We estimated the damage the ship sustained, as follows: Temporary repairs at Halifax and expense of getting her to New York, $15,000; permanent repairs at New York, $10,900, that included the damage occasioned to the vessel by running on the Bell Rock; we took her full value before she struck on Bell Rock, as well as we could ascertain it, then deducted the expense of temporary repairs at Halifax $15,000, and the other item before spoken of; $395,936 46-100 is the sum the ship is valued at in the adjustment to be contributed for; $3,163 54-100 was the net sales of the materials saved.

Net sales and value of goods saved and delivered in New York $351,797 24, amount contributed for in general average $704,569 20, making together $1,056,366 44, the value of cargo contributing. The freight is valued in contribution at $21,097 28, the whole of her freight on her whole cargo, of this $11,386 24 was saved, being earned.

Passage money is charged with contribution; * * * time of making up the adjustment; the Humboldt was a passenger and freight ship; it was part of her regular business to carry passengers.

* * * * or heard of its being done; the amount chargeable to the defendant is.....$5,339 96

The whole amount of the shipment is.....$22,950 36

The general average thereon, at $76 37, is 17,527 18

Cr.

By goods lost..... 12,187 22

$5,339 96

And thereupon the plaintiff's counsel on his part rested his case. Whereupon the counsel of the defendants, learned in the law, prayed the said court to charge the jury in form and manner following, that is to say:

First. That inasmuch as from the evidence it appeared that the loss of the ship arose from her bearing up for Halifax, and in consequence of so doing; that such bearing away was a deviation from her voyage, unless excused by circumstances for which the ship and her owners were not responsible; and that the claim by the ship for contribution against cargo can only be made in consistency with the obligations of the ship-owners to the owners of the cargo.

And the judge thereupon charged the law as contended by the defendants' counsel.

The counsel of the defendants then further prayed the judge to charge the jury:

Second. That inasmuch as it appeared by the evidence of the plaintiff that the ship was not provided with sufficient coal for a passage to New York at that season, and this without any excuse arising from sea perils or extraordinary accident or occurrence, the bearing up for Halifax arose from the fault of the ship owner, and the loss given in evidence gave rise to no claim in behalf of the ship against the cargo for the loss of the ship.

And the judge thereupon refused to charge in this behalf as claimed by the defendants' counsel, and they thereupon excepted to such refusal.

The counsel of the defendants thereupon prayed the judge to charge the jury:

Third. That the loss given in evidence did not arise from a voluntary stranding, so as to give rise to a general average contribu-

tion for the loss of the ship, inasmuch as by the plaintiff's evidence it appeared that at the time of the final turning of the ship towards the land she had received her death wound, and was actually sinking at the time, and was not in a sound state and in a merely undangered condition.

And inasmuch as it further appeared that the master had no expectation of stranding the ship when he so turned her to the land, for he knew the coast to be a rugged, rocky coast, with bold, deep water up to it, and he made no choice of the place of stranding, but that his object was merely to sink nearer the shore, where he would more easily save lives and cargo by his boats from a sinking ship; and inasmuch as it further appeared that the ship never did reach the shore, but sunk at sea on a reef, three hundred feet from the shore, where the water was three fathoms deep at the bow and six fathoms at the stern; and that on each or on some, or on all these grounds, the loss given in evidence was not in law a voluntary stranding, giving rise to a general average contribution for the loss of the ship.

But the judge then and there refused to charge the jury as prayed by the counsel of the defendants, to which refusal the counsel of the defendants then and there excepted.

The counsel of the defendants further prayed the judge to charge the jury:

Fourth. That even if the loss in evidence did give rise to a general average contribution for the loss of the ship, the valuation of the ship assumed by the adjuster was not according to law, inasmuch as the ship was valued as a sound ship, with a deduction of the estimated cost of repairs, as if in a place of safety; whereas she was before and at the time of the voluntary act of sacrifice pretended a wrecked or ruined ship, and should only be valued as such, like a mast which is cut away after it is broken.

But the judge refused to charge as prayed, unto which refusal the defendant's counsel excepted.

And the defendant's counsel further prayed the judge to charge the jury:

That under the evidence in this cause the plaintiff was not entitled to recover for losses incurred in the course of such deviation, to be contributed for by way of general average, contribution, or otherwise; but the judge refused so to charge, and the defendant's counsel excepted.

All which exceptions were duly noted by the judge on the trial when made as aforesaid.

And thereupon the jury thereupon found a verdict for the plaintiff, that the defendant did undertake and promise in manner and form as the plaintiff had declared against the defendants; and they assessed the damages of the plaintiff for the non-performance of the promises of the defendants in this behalf at five thousand three hundred and thirty-nine dollars and ninety-six cents, besides their

costs, and for those costs six cents. And inasmuch as the matters given in evidence to the said jury, and the matters insisted on by the counsel of the parties on the said trial, and the decisions and charge of the judge upon the said trial, and the exceptions on part of the defendants, do not by the record of the verdict aforesaid. The judge hath unto this bill of exceptions, containing the same to be attached as part of the record of the said verdict, set his seal, this twelfth day of May, in the year of our Lord one thousand eight hundred and fifty-six, and of our independence the eightieth.

SAML. R. BETTS, [L.]

Whereupon all and singular the premises being seen, and by the court here fully understood, and mature deliberation being thereupon had, it appears to the court now here that the verdict of the jurors aforesaid, in form aforesaid given, is in all respects good and valid in the law, anything in the said bill of exceptions contained to the contrary thereof notwithstanding :

Therefore it is considered that the said plaintiff do recover against the said defendants his said damages, costs and charges by the jurors aforesaid, in form aforesaid assessed, and which said damages are reduced, by consent, to the sum of five thousand two hundred and forty-five dollars and fifteen cents, and also nine hundred and forty-eight dollars and eighty-eight cents ($948 88) for his said costs and charges, by the said court now here adjudged, of increase to the said plaintiff, and with his assent ; which said damages, costs and charges in the whole amount to six thousand one hundred and ninety-four dollars and three cents, ($6,194 03.) And the said defendant, in mercy, &c.

Judgment signed this 9th day of December, 1856.

R. E. STILWELL,
Dep. Clerk.